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IN THE

Supreme Court of the United States

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October Term, 1944

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No. 1055

—o—o—

G. F. HOWARD,

Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,

Respondent.

—o—o—

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—o—

ELDON MARTIN,
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Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 146 F. (2d) 316 and is printed in the record at pages 67-77. The opinion of the United States District Court for the District of Nebraska appears in the record at pages 41-42.

STATEMENT

Petitioner's statement is not only inadequate but much of it is unsupported by the record. Respondent therefore sets forth the facts, as follows:

Petitioner asks damages for an alleged breach of an employment contract as well as reinstatement to his former position, with restoration of seniority rights (R. 2-9). He was formerly employed in Kansas by respondent as an agent-telegrapher (R. 44). On October 5, 1932, petitioner was discharged (a) for violating the rule prohibiting the use of intoxicating liquor, (b) conduct unbecoming an employee occupying a responsible position, and (c) absenting himself from duty without permission (R. 44).

Contrary to petitioner's assertion, an investigation of the grounds for his discharge was held by respondent's superintendent and petitioner was given a transcript of the evidence (R. 44-45). Petitioner's statements to the effect that he "was dismissed upon a trumped-up charge" and that he "had no entries upon his service record, as to demerit marks, or otherwise" (Pet. 5), are unsupported by the record. His statement that he "was denied a hearing or a transcript of the evidence as provided by Rule 30" (Pet. 5-6) is false (R. 44-45).

Petitioner's claims for damages on account of alleged wrongful discharge, for loss of seniority rights, and for restoration to his former position, have been the subject of litigation with respondent in four different tribunals. In January, 1934, he filed suit in the District Court of Decatur County, Kansas, and in February, 1937, obtained a $500 judgment for damages on account of his alleged wrongful discharge and for loss of seniority rights. Respondent prosecuted no appeal but paid the damages and

petitioner accepted the same (R. 45). Thereafter, in September, 1937, the Order of Railroad Telegraphers, of which petitioner was a member, prosecuted the same claim on his behalf before the National Railroad Adjustment Board. That Board denied his claim and dismissed the case on April 7, 1938, on the ground that the Kansas judgment was res adjudicata (R. 46-47). Thereafter, on June 25, 1943, petitioner filed the instant suit in the United States District Court for Nebraska (R. 1) and, after a trial to the Court, a judgment of dismissal was entered June 15, 1944 (R. 41-42). Petitioner appealed from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit and that Court affirmed the District Court's judgment on January 8, 1945 (R. 77-78).

The initial suit filed by petitioner in the Kansas State Court was for all damages, past, present and future, alleged to have resulted from his alleged wrongful discharge on October 5, 1932 (R. 15, 45-46). Respondent paid and petitioner accepted the $500 judgment entered therein by the Kansas Court in February, 1937. Said Kansas judgment not only became res adjudicata of all claims litigated therein, but also of all claims that might have been litigated therein (*Gould v. Evansville and Crawfordsville R. Co.*, 91 U. S. 526; *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371). As the Court of Appeals held, petitioner's cause of action was indivisible (*Howard v. C., B. & Q. R. Co.*, 146 F. (2d) 316, 319; *McIntosh v. Wiggins* (C. C. A. 8), 123 F. (2d) 316; *Snell v. Turner Lumber Co.* (C. C. A. 2), 285 F. 356).

Notwithstanding petitioner's acceptance of the aforesaid judgment, petitioner, through the Order of Railroad Telegraphers, filed a claim with the National Railroad

Adjustment Board in September, 1937, wherein he sought reinstatement to his former position, as well as reimbursement for the alleged wrongful discharge, on account of which the Kansas judgment had been paid by respondent and accepted by petitioner (R. 25, 46). After this second hearing on the same claim, the National Railroad Adjustment Board dismissed petitioner's claim (R. 46) on the ground that petitioner had already been compensated by respondent's payment of the Kansas judgment for any alleged breach of the employment contract and declined to reinstate him in his former position (R. 27, 46, 47).

In addition to all this litigation *with respondent*, petitioner instituted suits in January, 1940, and April, 1941, in the United States District Court for Kansas, for writs of mandamus to compel the National Railroad Adjustment Board to entertain, hear and decide his said claim, on the merits, despite the fact that said Board had already heard and decided the same as above stated. The Kansas District Court dismissed both actions. The United States Circuit Court of Appeals for the Tenth Circuit affirmed the only judgment, from which an appeal was taken (*Howard v. United States ex rel. Alexander, et al.*, 126 F. (2d) 667), and certiorari was denied by this Court (*Howard v. United States ex rel. Alexander, et al.*, 316 U. S. 699). Respondent was not a party to these proceedings (R. 47-48).

Petitioner instituted the instant case more than ten years after he was discharged, and after petitioner's superior officer (respondent's division superintendent), who discharged petitioner, had died (R. 48). In the instant case petitioner seeks reinstatement with full seniority rights, together with damages alleged to have been sus-

tained as a result of his discharge on October 5, 1932 (R. 2-9).

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QUESTIONS PRESENTED BY PETITIONER

It is difficult to determine from the petition and supporting brief just what questions petitioner claims are presented, or what reasons he relies on for the issuance of a writ of certiorari, but it is obvious that he has no grounds for the issuance of the writ. Whether or not the judgment of the Kansas Court is res adjudicata of all claims arising out of his alleged wrongful discharge on October 5, 1932, presents no ground for the issuance of the writ. It is not claimed that the judgment of the United States District Court for Nebraska is either contrary to Kansas law or that the affirmance thereof by the United States Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal, or with the decisions of this Court.

Petitioner's principal contention seems to be that the Kansas State Court—which he selected as the forum for adjudicating his dispute with respondent, wherein he prosecuted his claim to judgment, and which judgment respondent paid and petitioner accepted—had no legal power to act and that its judgment was wholly void.

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ARGUMENT

The Kansas State Court, in which petitioner filed his claim for the alleged wrongful discharge (R. 13-15, 45, 46), was a court of general original jurisdiction with power to hear and decide such a claim (Kansas Constitution, Art. 3, Sec. 1; Art. 3, Sec. 6; Kansas General

Statutes, Sec. 20-301; *Manley v. Park,* 62 Kan. 553, 64 Pac. 28, 187 U. S. 547; *Shuster v. Finan,* 19 Kan. 114). Since that Court had jurisdiction of the parties and the subject matter, the $500 judgment entered by it became final when same was paid by respondent and accepted by petitioner.

Petitioner not only accepted the benefit of the Kansas judgment (R. 6, 45), but in the present proceeding he relied upon that judgment to establish the alleged breach of contract (R. 6; see also p. 10, Par. 8, of petitioner's brief herein). A litigant cannot thus select a forum, invoke the jurisdiction of the Court, prosecute his claim to judgment, accept the benefit of the judgment, and thereafter deny the jurisdiction of the Court in which he obtained the judgment (*Wible v. Wible,* 153 Kan. 428, 110 Pac. (2d) 761; *Wilson v. Union Electric Light & Power Co.* (C. C. A. 8), 59 Fed. (2d) 580; *Prichard v. Nelson* (C. C. A. 2), 137 F. (2d) 312).

If it be true, as presently claimed by petitioner, that he had rights under the National Railway Labor Act as well as at common law, this fact did not oust the Kansas Court of jurisdiction of the subject matter. The petitioner was free to select his remedy at common law in the Kansas courts or under the administrative procedure provided in the National Railway Labor Act (*Moore v. Illinois Central R. Co.,* 312 U. S. 630). Having elected to enforce his rights at common law in the Kansas courts, having prosecuted that claim to judgment, and having accepted and retained the fruits of that judgment, he is in no position to claim said judgment was void and seek to relitigate his claim in another forum.

Petitioner has always claimed in all of the tribunals whose jurisdiction he has invoked that the right which

he alleges respondent infringed was founded upon breach of an employment contract on October 5, 1932. The conclusion of the National Railroad Adjustment Board, of the United States District Court for Nebraska, and of the Court of Appeals for the Eighth Circuit, to the effect that the judgment of the Kansas Court is res adjudicata of the claims which petitioner seeks to relitigate here, is clearly supported by the authorities cited in the Court of Appeals' opinion (R. 73-76).

Petitioner's Action Is Barred by the Statute of Limitations

As indicated above, petitioner commenced the instant suit more than ten years after his alleged cause of action accrued on October 5, 1932 (*Baron v. Kurn*, 349 Mo. 1202, 164 S. W. (2d) 310; *Barry v. Detroit Terminal R. Co.*, 307 Mich. 226, 11 N. W. (2d) 867, 869). For breach of a written contract Kansas law provides that action must be brought within five years from the date the action accrues (1935 Kansas General Statutes, Sec. 60-306, First). The same period of limitations is provided in the 1929 Nebraska Compiled Statutes, Sec. 20-205. If petitioner originally had a cause of action and if respondent had not already satisfied the same, the Kansas and Nebraska statutes of limitation would presently be a bar to any prosecution of said alleged cause of action.

No Question Is Presented With Reference to Discrimination Against Petitioner by His Labor Union nor of Any Domination of Said Union by Respondent

Petitioner's claim that this case involves a question of discrimination against him by the Order of Railroad Telegraphers or that said union was dominated or interfered with by respondent is not only untrue but is wholly

unsupported by the record. Petitioner made no such claim in his amended complaint herein (R. 2-9). Indeed, the record herein would support a contrary contention. Petitioner's union filed and prosecuted his alleged claim with the National Railroad Adjustment Board long after petitioner had prosecuted and obtained his judgment on the same claim in the Kansas Court and long after respondent had paid and satisfied said judgment (R. 25-28, 46). Moreover, petitioner's union handled petitioner's claim with respondent's officers before filing the petition with the Railroad Adjustment Board (R. 45).

Findings of Fact and Conclusions of Law

The District Court's findings of fact herein are printed in the Appendix of this brief. It is impossible to give record references to evidence of record in support of each finding, because petitioner has not included in the record the evidence adduced before the District Court. Moreover, petitioner did not, on appeal, assign any error with reference to the sufficiency of the evidence to support the District Court's findings of fact (R. 51, 52).

Immediately following the findings of fact in the Appendix will be found the District Court's conclusions of law. Citations of authority will be found in support of each conclusion.

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CONCLUSION

Since petitioner has already litigated his alleged claim for wrongful discharge in the Kansas State Courts, before the National Railroad Adjustment Board, before the United States District Court for Nebraska, before the United States Circuit Court of Appeals, and inasmuch as respondent paid and petitioner accepted the full amount

of the Kansas Court's judgment nearly ten years ago, respondent respectfully submits that the judgment of the Kansas Court is res adjudicata of petitioner's claims; that the judgment to that effect of the District Court and the Circuit Court of Appeals herein is correct; and that petitioner's application for the issuance of writ of certiorari should be denied.

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